

DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Clarification of the Territorial Exclusivity Limits of)
Section 73.658(b) of the Commission's Rules as Applied to the)
Restrictions on Access to NBC Network Programming in the)
Great Falls, Montana Community in a Certain Arrangement)
Involving Television Broadcast Stations KBAO, Lewiston, MT et al)

DA-04-747

RECEIVED - FCC

APR 28 2004

Federal Communication Commission
Bureau / Office

RECEIVED

MAY - 6 2004

Federal Communications Commission
Office of the Secretary

To: The Media Bureau

**COMMENTS OPPOSING REQUEST FOR EXPEDITED DECLARATORY RULING
BY MAX MEDIA OF MONTANA LLC**

As of July 2005, NBC's current affiliation agreement with Television Broadcast Station KTGF, Great Falls, Montana ("KTGF" or the "Station") expires by its terms. Once that agreement expires, NBC does not have any arrangement that hinders NBC from affiliating with any television station assigned to Great Falls. Instead, NBC, in a wholly independent exercise of its own business judgment, has decided not to renew the Station's affiliation.

Max Media of Montana, LLC, the Station's current licensee, wants to divest the Station as soon as possible. However, Max Media also wants to compel NBC to retain the Station's affiliation past July 2005, even though NBC had decided long ago (and prior to Max Media's acquisition of the Station) not to renew that affiliation on its current terms, and even though NBC cannot possibly know, at this time, what entity is going to buy the Station from Max Media.

Nonetheless, Max Media – in a request for "expedited" relief filed February 25, 2004 (the "Request"), or nearly three years after Max Media first learned of NBC's intention not to renew the Station's affiliation – alleges that Sunbelt Communications ("Sunbelt"), through an arrangement with NBC, has coerced NBC to drop the Station's affiliation in violation of Section 73.658(b) of the Commission's Rules

No. of Copies rec'd _____
List ABCDE _____

(the Rule"). The Rule prohibits any station from entering into an agreement that would limit a network entity's right to distribute its programming to stations in other communities. NBC does have (and expects to continue to have) affiliation agreements with three Sunbelt-owned stations that already serve Great Falls or the Great Falls DMA. But none of these agreements, or any other arrangement with Sunbelt, precludes NBC from deciding to affiliate with a Great Falls station once the Station's existing agreement expires.

No evidence in this proceeding demonstrates otherwise.¹ Indeed, the evidence already presented by Max Media shows that NBC's decision to allow the Station's affiliation agreement to expire by its terms was not required by any arrangement. That NBC had other reasons not to renew the Station's affiliation underscores that the nonrenewal of KTGF was fundamentally a result of NBC's own business judgment. Accordingly, Max Media's Request should be denied.

BACKGROUND

NBC currently has three affiliated stations assigned to the Great Falls DMA. Two – Sunbelt-owned stations KBAO(TV), Lewiston, and KBBJ(TV), Havre, each a satellite of Sunbelt-owned KTVH(TV), Helena, Montana – became NBC affiliates in 2000.² (Great Falls itself also is located within the predicted Grade B contour of KTVH.) The Station was the third, with an affiliation that was signed in 1995 and was to expire, by its terms, in July 2005.

NBC had determined by Spring 1999 that it did not intend to renew its affiliation agreement with the Station. At that time, the Station was owned by Continental Media, which had no other NBC affiliates. But NBC saw no reason to terminate the agreement prematurely. For example, when Max Media acquired the Station in 2001, NBC voluntarily agreed to assign the Station's affiliation to Max Media, even though, at that

¹ Max Media notes that it does not seek "to assert a claim or action against NBC in connection with the Arrangement." See Declaratory Request at 9 n. 19. NBC agrees that the Rule does not authorize Commission action against programmer's conduct. However, Max Media's action would directly limit NBC's ability to make private business decisions and so necessitates an NBC response.

² These additional affiliations did not require any increase in network compensation to Sunbelt. NBC also has substantial other affiliate relationships with Sunbelt.

time, NBC already had three other affiliates – Sunbelt's Helena, Lewiston and Havre stations – serving parts of the Great Falls DMA

NBC also has been responsive to Max Media's inquiries regarding NBC's intentions with regard to the Station. In September 2001, NBC confirmed Max Media's understanding that NBC had decided not to renew the Station's affiliation.³ NBC added that it expected to rely on Sunbelt's stations as its affiliates in the Great Falls DMA, as a result of NBC's own business judgment, not any imagined restriction imposed by Sunbelt on NBC, the nation's leading television broadcast network. In NBC's independent judgment, NBC would not require additional affiliates in the market if Sunbelt fulfilled its announced plan. However, as NBC indicated to Max Media in subsequent correspondence, NBC was ready, able, and, depending on circumstances, willing, to change that determination.⁴

Max Media now wants to sell the Station in order to acquire a second Great Falls station, KFBB-TV, as part of a multi-station acquisition. Because Max Media cannot have attributable interests in two independent full-power Great Falls stations, it has listed the Station for sale with multiple brokers.⁵ It also has recently filed an assignment application (without the requisite notice to NBC) to assign the Station to an independent trust.⁶ Although Max Media apparently expects to divest the Station as soon as possible, it has urged the Commission to declare NBC's independent decision to allow the Station's affiliation agreement to expire by its terms violates the Rule

³ See Letter from John Damiano, NBC, to Gene Loving (dated Sept. 21, 2001) (attached as Exhibit B-2 to Declaratory Request).

⁴ See *id.*

⁵ See FCC File No. BALCT-20040305ACI, Exhibit 4.

⁶ *Id.* This apparent lack of notice suggests a disturbing pattern. Max Media also recently failed to notify NBC as to its unilateral termination of NBC affiliation of Station KLSB-TV, Nacogdoches, Texas.

ANALYSIS

The Commission has clarified repeatedly that the Rule is not intended "to guarantee a station the right to carry network programming."⁷ As a matter of Commission long-standing policy, "[n]etworks have no obligation to affiliate with a particular station."⁸ Accordingly, the Rule is "intended simply to assure the . . . network is not deprived of the right to sell to any station in a separate . . . community . . . by virtue of a contract or understanding with any station."⁹ In other words, the Rule was meant "to free the producer/distributor from contractual restraints rather than to impose any new sale or distribution obligation."¹⁰

In Max Media's request for expedited declaratory judgment regarding a matter that was known to Max Media nearly three years ago, Max Media urges the Commission to ignore these long-standing and sensible policies. In particular, Max Media pushes the Commission to intervene as to NBC's decision to allow the Station's existing affiliation agreement to expire because of its unsupported assertion that Sunbelt and NBC have an arrangement that blocks NBC from affiliating with any Great Falls station after the expiration of the Station's affiliation.

Max Media's claim founders on both law and fact. The Rule states, in relevant part:

No license shall be granted to a television broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization . . . which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization. . .

Sunbelt has not entered into any arrangement with NBC that "prevents or hinders" a station located in a different community from broadcasting any NBC program. What will prevent the Station from airing NBC programming after July 2005 is not any nonexistent arrangement between Sunbelt and NBC, but that the

⁷ See *Letter to Eugene F. Mullin*, 10 FCC Rcd 4416, 4417 (MMB 1995).

⁸ See *id.*

⁹ *Letter to The Helen Broadcasting Company Limited Partnership*, 5 FCC Rcd 2829 (1990).

¹⁰ *Id.*

Station will no longer have an affiliation agreement with NBC. And the nonrenewal of the Station's affiliation agreement is not part of an arrangement with any broadcast station; the Station no longer will have an affiliation agreement with NBC because NBC has decided on its own that it no longer wants to affiliate with the Station

Max Media's own submission confirms that Sunbelt has not violated the Rule.¹¹ In addition to a self-serving and largely speculative declaration from Gene Loving, Max Media submitted copies of four pieces of correspondence with NBC in an effort to substantiate its claims. None do. To the contrary, these four exchanges show that NBC made its own independent determination not to renew the Station's affiliation, not that Sunbelt somehow restricted NBC's ability to distribute its programming or that the purported "arrangement" had any causal relationship with NBC's decision not to renew KTGF.

In the April 26, 1999, correspondence from NBC to James E. Rogers, NBC states that "NBC had made a decision that it will not renew its affiliation agreement with [the Station] in Great Falls, Montana."¹² Max Media attempts to characterize this straightforward declaration of fact as the "final step" in an arrangement with Sunbelt.¹³ To the contrary, the clear words of the statement refer to a decision that already had been made at the time of the letter. So, the decision not to renew was not the last step in the process, but a separate action, independent of the other issues addressed in the April 1999 Letter

Max Media itself recognizes that this obvious (and correct) interpretation of the Letter is fatal to its allegations. So, Max Media claims that the next sentence undercuts the first sentence's plain meaning.¹⁴ That sentence reads, in pertinent part: "It is NBC's understanding that if NBC does not renew that

¹¹ Although NBC agrees with the bulk of Sunbelt's opposition to the Request, NBC does note that the Rule, by its terms (and consistent with other Commission rules), limits stations, not networks

¹² See Letter from John Damiano to James E. Rogers (dated April 26, 1999) (the "April 1999 Letter").

¹³ See, e.g., Declaratory Request at 15. Max Media also alleges that Sunbelt's actions have actively interfered with "NBC's business judgment." This assertion is conclusory and false.

¹⁴ See Declaratory Request at 8

agreement, Beartooth Communications Company, the NBC affiliate in Helena, Montana, will establish a news bureau in Great Falls " 15

Max Media asserts that this language means that 'the decision to terminate the KTGF affiliation was made contingent on the performance of certain obligations by Rogers/Sunbelt under the Arrangement " 16 But that is the opposite of what the sentence says. The sentence does not make NBC's decision not to renew the Station's affiliation contingent on Sunbelt's actions, but rather makes Sunbelt's obligations contingent on NBC's decision. In other words, NBC had no responsibility to Sunbelt not to renew the Station – but if NBC held to its determination not to renew KTGF, then Sunbelt planned to complete several action items. NBC, not Sunbelt, was the sole decision-maker as to whether to renew the Station's affiliation

Other materials submitted by Max Media confirm the first letter's plain meaning. Max Media's theory of this case is that NBC would have renewed its affiliation agreement with KTGF but for the alleged arrangement with Sunbelt. But the letter dated September 24, 2001, underscores that NBC's decision not to renew the KTGF affiliation is not dependent on any asserted arrangement between Sunbelt and NBC. 17 According to the September 2001 Letter, NBC, even if free from any alleged arrangement with Sunbelt because of Sunbelt's alleged failure to deliver, did not pledge just to renew KTGF affiliation on its existing terms. Instead, NBC would "use its business judgment and discretion to determine which station it wishes to be the NBC affiliate " 18 At that time, NBC *might* entertain negotiations with the Station as part of NBC's decision "with whom to affiliate in the Great Falls area " 19 Of course, the Letter's language does not

¹⁵ See *id.* (quoting April 1999 Letter).

¹⁶ *Id.*

¹⁷ See Letter from John Damiano to Gene Loving (dated Sept. 24, 2001) (attached to Request at B-2) (the "September 2001 Letter")

¹⁸ *Id.*

¹⁹ *Id.*

preclude NBC from deciding to go without an affiliate in Great Falls at all – or affiliate with one of the many other full-power or low-power facilities in the area.

Again, Max Media tries to finesse this point by noting that if Sunbelt's "criteria were not satisfied, Max would be able to compete to retain the affiliation."²⁰ But that is a far cry from what Max Media needs to show to substantiate its claims. It is not enough for Max Media to show that, but for an alleged arrangement between Sunbelt and NBC, NBC *might* have considered affiliating with KTGF or other television outlet assigned to Great Falls. In order to substantiate a claim that an arrangement between Sunbelt and NBC actually prevented a station in another community from airing NBC programming, Max Media must, at a minimum, show that a Sunbelt-NBC arrangement was the but-for cause of NBC's decision not to affiliate with any station in Great Falls. Otherwise, the choice of NBC not to affiliate in Great Falls is manifestly not a matter of an impermissible restriction imposed by Sunbelt but simply a permissible exercise of NBC's business discretion.

The third piece of correspondence offered by Max Media – an e-mail exchange dated September 9, 2003 – states that Sunbelt is continuing on its plan to build a Great Falls news bureau. Separately, the exchange notes that "[o]ur [i.e., NBC's] plan remains not to renew the affiliation on KTGF when it expires."

²¹ Nowhere does the e-mail link one plan to the other.

Also notable is that NBC is willing to send out the requisite nonrenewal notice at any time Max Media wishes.²² There is no way to square NBC's willingness to give notice of nonrenewal at any time with Max Media's claim that NBC's decision not to renew KTGF was somehow contingent on Sunbelt making good on its obligations. If NBC had chosen not to renew the Station because of some *quid pro quo*

²⁰ See Declaratory Request at 9.

²¹ See E-mail from John Damiano to Gene Loving (dated Sept. 9, 2003) (attached to Request as Exhibit B-3) (forwarding e-mail from Jean Dietze regarding status of NBC's, and, separately, Sunbelt's plans).

²² As is NBC's practice, in an effort to give affiliates substantial notice of nonrenewal, NBC will be sending Max Media its notice of nonrenewal shortly.

with Sunbelt, it would be foolish indeed for NBC to send a nonrenewal notice to the Station even before NBC knew whether Sunbelt was actually going to "fulfill" its alleged part of the bargain.

The fourth letter is evidence, if anything, of NBC's continued patience with Max Media.²³ After calmly noting the disturbing nature of Max Media's accusations, NBC confirms that it intends to honor the Station's existing affiliation agreement until it expires. In an effort to reassure Max Media, NBC also notes that it will honor such agreements for all Max Media affiliates until expiration.²⁴ NBC also notes that "our current plan" is to rely on Sunbelt for its Great Falls affiliation. Again, nothing in this letter indicates that NBC cannot affiliate with the Station or any other Great Falls station any time that it wishes.

Max Media is silent on another telling point. Under the terms of the Station's affiliation agreement, NBC could have terminated the Station's affiliation agreement when Max Media acquired the Station in 2001. At that point, Sunbelt had three stations serving the market and, according to Max Media's theory that Sunbelt can control NBC's decisions, had every reason to demand that NBC drop the Station's affiliation at that time. But NBC did not terminate the agreement, as, in NBC's obviously independent judgment at that time, it would not have served the network's interest to terminate the agreement.

Max Media also ignores the many practical reasons for NBC's decision to allow the Station's affiliation to expire.²⁵ For example, as in *RCA Corp.*, the Station is no longer necessary to serve the market.²⁶ Great Falls is within the Grade B contour of existing NBC affiliate KTVH(TV), Helena, Montana. The recent development of KTVH satellites in Lewiston and Havre has ensured additional coverage of the

²³ See Letter from Randel Falco to Gene Loving (dated Oct. 22, 2003) (Exhibit B-4 to Request).

²⁴ See *id.* That Max Media claims to read this latter statement as an implied threat – see Loving Declaration at 4 – underscores the distorted lens through which Max Media views NBC.

²⁵ See *RCA Corp.*, 60 RR 2d 563 (1986) (holding that nonaffiliation did not violate Rule because NBC pledged that there was no agreement that precluded affiliation with the relevant station and that NBC had substantial other reasons, including substantial coverage of the relevant area, not to affiliate with the relevant station).

²⁶ See *id.* (noting that multiple translators provided sufficient coverage of the relevant area to justify nonaffiliation).

Great Falls DMA, such that, in NBC's judgment, the costs associated with the Station's affiliation were no longer reasonable. In addition, as in *Mullin*, the proposed future affiliate in the market has multiple other NBC affiliations, ensuring an ongoing network relationship, and can ensure substantial service in the relevant market.

The contrast between the Sunbelt stations and the Station's history is stark. Unlike Sunbelt, Continental Media – the Station's owner when NBC first decided not to renew the Station in 1999 – did not own any other NBC affiliates. The subsequent frequent turnover of the Station from Continental to Max Media to the proposed independent trust as a temporary conduit for some future third party buyer, further disrupts any opportunity to strengthen the network's relationship with the Station. Finally, that Max Media has failed to notify NBC of its proposed assignment of the Station to an independent trust (and apparently has failed to notify NBC of unilateral changes to its NBC affiliation in Nagadoches, Texas), and is very anxious to acquire the current Great Falls ABC affiliate do not offer any reason for NBC to reconsider its decision.

In the end, Max Media's claims boil down to nothing more than a complaint that there may be no NBC affiliate assigned to Great Falls after July 2005. That sort of complaint is not the purpose of the Rule – the purpose of the Rule is to protect "the public's interest in market-based network service." ²⁷ And, absent sufficient evidence to present a substantial question of the material fact that there is a station-imposed obligation on NBC not to affiliate, the possibility that NBC may not have an affiliated Great Falls television outlet after July 2005 is no more of a concern to the Commission than the fact that NBC has an affiliate in Fort Worth, but not Dallas, or Goldsboro, and not Raleigh or Durham. ²⁸

²⁷ *Mullin*, 10 FCC Rcd at 4417. NBC will have at least 3 affiliates serving the market post-2005.

²⁸ See *id.* at 4417 (holding that the "Commission will not ordinarily interfere with the business judgments of networks").

As a closing note, Max Media's sudden rush to declaratory judgment against Sunbelt with regard to what NBC precisely will do in the Great Falls DMA in July 2005 is unripe. NBC could yet affiliate with a full-power or low-power Great Falls television facility by July 2005,²⁹ or NBC may choose to affiliate with none at all. This uncertainty is but a further demonstration that there exists no arrangement that would implicate the Rule.

Certainly, Max Media has no basis to claim that any remedy must occur prior to the mailing of the nonrenewal notice to the Station. Again, the Commission's concern is not whether the Station is an NBC affiliate. Even if NBC sends the notice out, which NBC intends to do, as is NBC's custom, well before the relevant deadline, that does not preclude NBC from affiliating with any station in Great Falls (including the Station) as of or following July 2005. The notice does nothing more than indicate that NBC will not renew the Station's affiliation under the existing agreement; it does not forever bar the Station from being an NBC affiliate.

CONCLUSION

Accordingly, Max Media's Declaratory Request should be promptly dismissed or denied.

Respectfully Submitted,

NATIONAL BROADCASTING COMPANY, INC.



F. William LeBeau

1299 Pennsylvania Avenue, NW
11th Floor
Washington, DC 20004
202-637-4535

Its Senior Regulatory Counsel and Assistant Secretary

April 28, 2004

²⁹ See *Mullin*, 10 FCC Rcd at 4417. Cf. 47 C.F.R. §74.780 (applying the Rule to Part 74 stations).

DECLARATION

I, John Damiano, Senior Vice President of Affiliate Relations, hereby declare, to the best of my personal knowledge and belief, and under penalty of perjury, that the foregoing Comments are true and accurate, including the fact that NBC does not have any arrangement with Sunbelt Communications Company, or any affiliate, subsidiary or station thereof, that would preclude NBC from entering into an affiliation agreement with a television facility assigned to Great Falls, Montana, following the expected expiration of the NBC affiliation agreement with KTGF(TV), Great Falls, Montana.

A handwritten signature in dark ink, appearing to read "John Damiano", is written over a horizontal line.

John Damiano

Senior Vice President, Affiliate Relations

Dated: April 27, 2004

CERTIFICATE OF SERVICE

I, Martha A. Shiles, do hereby certify that on this 28th day of April 2004, I caused copies of the foregoing "Reply to Opposition of Sunbelt Communications Company" to be served by prepaid, first-class mail on:

Alan C. Campbell, Esq.
Irwin, Campbell & Tannenwald, P.C.
1730 Rhode Island Avenue, N.W.
Suite 200
Washington, D.C. 20036

J. Dominic Monahan, Esq.
Ulvaas, Cobb, Richards & Fraser, PC
777 High Street, Suite 300
P.O. Box 10747
Eugene, OR 97440-2747

Julian L. Shepard
Williams Mullen
A Professional Corporation
1666 K Street, N.W. Suite 1200
Washington, D.C. 20006-1200


Martha A. Shiles